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No. 885

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

JOHN E. PARKS, JR., AND ROBERT M. FOOTE AND ALBERT McHUGH AND PAUL ZIEGLER AND SILVIO STAMERRO, INDIVIDUALLY AND AS REPRESENTATIVES OF THE MEMBERS OF LOCAL 28, IBEW, IN A CLASS ACTION AND LOCAL UNION 28, IBEW,

Petitioners,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND LOCAL UNION NO. 24 (IBEW),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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Introduction

Respondents repeatedly concede that both the courts below have agreed as to the basic evidentiary facts (IBEW Br. in Opp. 2, 24, 33). The questions presented by the petition for certiorari involve only the legal consequences of these established facts in the light of the interpretation of controlling federal statutes of the greatest public importance. Nevertheless, Respondents have attempted to

divert attention from these fundamental issues, which require no re-weighing of the evidence, by a volley of strident and utterly baseless attacks on the fairness and accuracy of the Statement of the Case in the petition and even in Judge Soper's dissenting opinion. In this effort, the briefs in opposition, particularly that of the IBEW, have regrettably failed to meet the standards of fairness and candor required of officers of this Court. Following is a brief documentation of some of Respondents' more salient misstatements and distortions and an assessment of their effect on the issues.

(1) *The Nature of International's Fiduciary Obligation Under Landrum-Griffin.*

The authoritative definition of the content of International's fiduciary obligation is one of the primary legal issues in this court. Respondents concede that the IP stated "to NECA in May [1961] that 'he would do everything he could [which necessarily included full exercise of his strike sanction power and other powers under the IBEW Constitution] to see that the Local submit to the Council all issues regarding the terms and provisions of a new contract which could not be resolved by bargaining between the Local and the Maryland Chapter' " (IBEW Br. in Opp. 29). This commitment was given after the agreement on the 10¢ wage increase had been reached in the Local's absence by the Council, and while the Local members were at work (App. 20-21). It was concededly not communicated to the Local, which so far as it knew was engaged in free bargaining with NECA's Maryland Chapter.

This commitment alone, under the circumstances, was sufficient to prevent free collective bargaining in Baltimore and thus to provoke the strike because "it is important to recognize that the possibility of a strike is a necessary

counterpart to free collective bargaining and an important element, even though well in the background, in the process of reaching agreement".[1]

The IBEW argues that such a commitment by the IP under the circumstances was "obviously normal and proper" (IBEW Br. in Opp. 29-30). Respondents' argument is thus premised here, as it was below, on a "challenge, [to] the legal basis" of Petitioners' position as to the content of the IP's fiduciary duty, the ground of the challenge being that this duty "is in no sense a duty comparable to that which exists between a trustee and a cestui que trust" (IBEW Reply Brief in 4th Cir. 4 n.). Respondents' basic premise, adopted by the majority of the Court of Appeals, squarely conflicts with the declared purpose of Congress to incorporate the general principles of fiduciary law into the labor field. The problems of burden of proof and content of the fiduciary obligation not only in respect to the above quoted commitment, but all the other conduct summarized at pp. 24-28 of the petition for certiorari are important legal problems, which Respondents' briefs, like the decision of the Court of Appeals, glosses over in silence. The important fiduciary provision of Landrum-Griffin can be given life only by application in representative specific cases such as the case at bar. Only by this Court's insistence in a case such as this upon sympathetic enforcement of the congressional purpose, as disclosed both by the language and legislative history of the Landrum-Griffin Act, may the rights of union members secured by that Act be given meaningful protection. The instant case itself is an example of why the necessary guide lines should be authoritatively laid down as promptly as possible.

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[1] Committee for Economic Development, The Public Interest in National Labor Policy (1961) 86, quoted in Brief of AFL-CIO as amicus in the 4th Circuit, pp. 11-12.

The following are the most salient mis-statements and distortions in the brief of respondents relating to the issue of breach of fiduciary obligation.

1. Respondent IBEW unblushingly argues that the 10¢ increase which the IP bargained in the Council knowing that the Maryland Chapter had discussed "far more substantial offers" (App. 20) was not unreasonably low (IBEW Br. in Opp. 23). Chief counsel for the IBEW was more candid when he conceded in the District Court that such an agreement by the IP "wasn't doing a very good job for labor" (Jt. App. 381). There is not a word in the briefs in opposition in explanation of this concession. Indeed the briefs gloss over in silence the mass of evidence which forced the concession, as well as the District Court's findings that the Council's action with respect to the Local on May 15th was unreasonable (Jt. App. 40, n. 44, 46). The IBEW brief contents itself with a reference to the one or two scraps of evidence in the case which might provide comfort to Respondents, if the case were now being argued for the first time before the fact finder.

2. Respondent IBEW asserts as a fact that the draft decision of the Council providing for a 10¢ increase was never communicated to the Baltimore employers (IBEW Br. in Opp. 4). The District Court however, found specifically that respondents had failed to prove such lack of communication, as Petitioners had failed to prove the contrary (Jt. App. 23); and one of the questions in this Court, in view of the general principles of fiduciary law sought to be incorporated into the labor context by Congress in Landrum-Griffin, is where the burden of proof lies. See the discussion and citations at p. 25 of the petition, all of which is met merely with silence by the briefs in opposition.

3. In the midst of what purports to be quotations from the District Court opinion, respondent IBEW asserts

(IBEW Br. in Opp. 11) that the Local's "so called collective bargaining in 1961" was unreasonable. The District Court however found that "there was no such unfair bargaining by the Local as would justify denial of the relief which will be granted in this case" (Jt. App. 42).

4. Respondent IBEW charges petitioners with an "outrageous mis-statement" to the effect that the District Court stated that the IP was "in league with the wolves in the establishment of Local 24" on the ground that the colloquy cited in support of the petitioners' statements shows that the District Court "was merely posing a rhetorical question, i.e. whether Freeman was acting as a good shepherd or whether he was in league with the wolves" (IBEW Br. in Opp. 24). Without characterizing the statement of respondent, it is sufficient to set forth the court's comments:

> "(The Court) Except they were so much the other side that you couldn't even give nem a charter. The people you had been dealing with in the organizing of the new Local were Vice-President of employers and you couldn't give a charter to the Vice-President of the employers . . . The idea that those men were really going to represent the rank in [and] file is too much . . . I think organizing a new Union after August the 1st, there is nothing wrong about that. I think the only question that goes into the issue of whether Freeman was acting as a good shepherd or whether he was in league with the wolves is the question; that he appoints wolves or collaborates with wolves in organizing the new local. I think that is the point and that carries back as reflecting his attitude" (Jt. App. 592-93).

The final opinion of the District Court also clearly indicates that the court was not posing a rhetorical question (Jt. App. 30-1).

5. Respondents deny that the Local and its leaders had successfully sued International (IBEW Br. in Opp. 5), and, in the course of purported quotations from the District Court opinion, assert that none of the court actions involved the IP personally or was important (IBEW Br. in Opp. 17). Respondents however do not deny that only after request to the International for action was turned down and the suits were brought and nearing trial did the Local obtain from the International the full relief prayed. The Respondents' briefs failed to do justice to the District Court findings as to unreasonable high-handedness of the IBEW in the earlier relations between the parties, or to discuss the undisputed evidence of Freeman himself as to his deep-rooted hostility to intra-union litigation notwithstanding the Landrum-Griffin Act, which he "hated", and the relentlessness with which IBEW disciplinary procedures followed reasonable assertions of the Local's rights. These facts, in light of the District Court's advantage of seeing and hearing the witnesses and of Freeman's conduct in failing to disclose to the Local prejudicial arrangements made by him behind the Local's back in collaboration with the adversary, fully support the District Court's findings as to the extent to which the IP's improper reasons were an ingredient of his "mixed motives" sufficient to vitiate the revocation (See Petition for Certiorari 9-10, Jt. App. 18-19 and n. 21).

6. Local 24's brief in opposition (p. 13) makes the astounding statement that the District Court found as a fact that the IP acted in good faith in refusing to authorize the strike, citing Jt. App. 35, where the only reference to good faith was that the IP should not have sat in judgment on the Local because "the propriety of his own action and his own good faith and motives in refusing consent to the strike and in preparing, filing and pressing the charges

were being called into question" (Jt. App. 35). Nowhere did the District Court find that the IP acted in good faith. In fact, for the reasons set forth in the petition the IBEW brief in opposition is in error in quarreling with petitioners' reading of the District Court opinion as having found the IP guilty of bad faith (IBEW Br. in Opp. 9).

7. Respondents emphasize out of proper perspective the District Court's finding that the IP did not bear any ill will or express particular malice against leaders of the local. The IP hardly knew the leaders personally and hence had no such feelings against them based on their individual personalities. However, the District Court was correct in concluding that the IP was guilty of legal malice in his motivation to punish the local for what the leaders had done in asserting their rights, particularly in the courts.

8. Respondents assert as a fact that the District Court found the local's request for a wage increase of 35¢ "unrealistic". Actually, the District Court did not so find. His finding was that such an increase would have brought the wages in Baltimore in line with the wages in near-by cities although it "*may have been* unrealistic" in view of the non-union situation in Baltimore (Jt. App. 25, n. 24). In any event the IP's misconduct can not be excused even if the Local's wage request were to be found unrealistic. In this case, the IP did not tell the Local before the strike vote that he disagreed with the local; instead he told the adversary and then he never told the local that he had done so.[2] Moreover, as the District Court pointed out, even

[2] Supporting the Local's figure is the Local's success in signing at least a dozen contractors at 35¢, the 50¢ increase over a two year period granted to Local 24 and the fact that the key sector of the electrical industry which according to Professor Dunlop is the sector material in the determination of wages, according to the uncontradicted evidence, is 80% unionized in Baltimore (App. 6, n. 3, Jt. App. 509).

if the IP's flock can be said to have erred in the negotiations, he is still bound by his abiding fiduciary obligations under Landrum-Griffin; even in chastisement he must be a good shepherd.

(2) *The Legality of the IP's Conduct in Regard to the Perpetual Council Clause.*

Nothing in Respondents' brief meets petitioners' argument as to the importance of the resolution of this issue by this Court. Respondent IBEW, by lifting out of context one passage of the District Court opinion, argues that the question is not really presented because the IP never had any intention of imposing a council clause on the local (IBEW Br. in Opp. 12). The Court of Appeals, however, notes that the District Court "intimated that the IP was so committed" (App. 42, n. 32, citing 203 F. Supp. at 298, 302, n. 27, 304; see also Jt. App. 382, 483) and the Court of Appeals, assuming such commitment by the IP, directly considered the legality of his objective and upheld it as legal and proper. This important legal question is thus squarely presented here.

In the last analysis, the IBEW admits that the objective of the IP was to force the local to the Council (IBEW Br. in Opp. 28). Nor do respondents deny that both courts below found that the Council had adopted a secret resolution, (of which, the evidence shows, the IP was a prime mover) to re-write the applicable contract between the submitting parties to include the strict evergreen clause in every case where, as here, one party wished to terminate and the other did not. Keeping this resolution a secret from the locals, which were entitled to consider it in drafting their contracts and determining whether to submit disputes to the Council, was itself a striking violation of the IP's fiduciary obligation and an attempt by stealth

to supplant the locals as collective bargaining agents for their members.

Respondents seek to defend the IP on the basis that he was merely carrying out the IBEW's well known policy in favor of the Council.[3] However, the CIR has been proclaimed as a voluntary tribunal clothed with no mandatory power which does not infringe on local collective bargaining, and the announced policy of the IBEW has been one of encouragement and not compulsion to submit local disputes to the Council (Jt. App. 16).

The Courts below agreed that Local 28 was the bargaining agent in its jurisdiction. The Federal statutes protect the rights of employees in the bargaining unit to choose their own representatives (Landrum-Griffin Act, §2, 29 U.S.C.A., Sec. 401; N.L.R.A. §9(a); 29 U.S.C.A., §159(a)).[4]

The International was never designated for this purpose. The IP had no right to go beyond the well publicized IBEW policy of voluntarism regarding the Council in order to supplant forever Local 28 as collective bargaining agent

[3] The IBEW also argues that the IP was justified in being angry at the Local for failure to attend the Council meeting of May 15th because the Local's collective agreement required its attendance (IBEW Br. in Opp. 31). The argument fails to allude to the fact that the District Court opinion in the instant case in terms too clear for misunderstanding, expressly rejected the argument, and stated that the Court, before the meeting on May 15th, had already announced its decision that the agreement between the Local and the Maryland Chapter did not require submission of their dispute to the Council and had been effectively terminated as of March 31st (Jt. App. 21, 37-8, n. 43).

[4] The majority decision of the Court of Appeals rests on the false premise that the International is the repository of all powers and the Local has only such powers in the area of collective bargaining as the International expressly accords to it (App. 37). This premise directly conflicts with the statutory provisions above cited which give control over the designation of the exclusive collective bargaining agent to "the majority of the employees in a unit" (29 U.S.C.A., Sec. 159(a)).

for its members. Only unmistakably clear and express language in union constitutions would justify a construction that an International union may compel the local's members to accept bargaining on a permanent basis by representatives not of their own choosing. The fact that Taft-Hartley rejected a proposal to prohibit all industry-wide bargaining does not justify the construction of the law urged by respondents and adopted by the majority of the Court of Appeals, which would permit an International, regardless of express constitutional provisions providing for a degree of local autonomy and declarations of International Conventions as to the voluntary character of submission of disputes to an agency such as the Council, to claim existence of an unpublicized policy as justification for an effort to take over bargaining for local members and completely and permanently destroy local autonomy thereby. The decision below is a threat to the rights of virtually every rank and file member in the American Labor movement. If that decision stands, Landrum-Griffin is merely a futile gesture.

(3) *Full and Fair Hearing*

Respondents have submitted on this issue (IBEW Br. in Opp. 17, 20-22, 31) a melange of quotations from earlier litigation dismissed by the District Court, on motion, *without prejudice* (Jt. App. 15), as to which IBEW's counsel conceded below that he was not claiming any estoppel (Apx. 5),[5] and of argument foreclosed by the findings of fact of both the courts below as set forth in the majority opinion of the Court of Appeals, in the following language:

> "The District Court without passing on the question of whether the IP had the authority to decide this case, held 'it was one which he should have referred to the IEC or some other impartial tribunal . . ., [as] the propriety of his own action and his own good faith and

[5] This reference is to the supplemental appendix filed with appellees' (petitioners') brief in the Court of Appeals.

> motives in refusing consent to the strike and in preparing, filing and pressing the charges were being called into question.' 203 F. Supp. at 307. This supposed defect was held not to have been cured by review by the IEC. Although the court found that the IEC was not prejudiced, it held that the review was in the nature of an appeal, not a trial *de novo*. We do not agree that, on the facts in this case as established in the court's findings, there was a procedural defect in the trial before the IP justifying a court of law to interfere with and to overturn the action taken" (App. 49).

In the light of these findings, it is highly misleading for Local 24 to represent to this Court in its "statement of the Salient Facts" in its brief in opposition (p. 5) that "although deemed an appeal by the Constitution, the IEC permitted counsel for Local 24 [28] to treat the proceedings as a hearing *de novo*." It is simply incomprehensible how the IBEW can argue that "It is idle for petitioners to argue . . . that Local 28's defense in the revocation proceedings *before the IP* 'was based on the impropriety of his own conduct in the matter out of which the charges arose'" (IBEW Br. in Opp. 31), especially when the IBEW conceded (Ibid) that the point was raised in argument before the IP, which was the first time in the proceedings that the Local could confront the IP since all the evidence had been taken by a referee. The record before the referee establishes that the Local's opening statement stressed as "the primary issue" the charge that the IBEW was colluding with the employers and attempting to force on the Local a perpetual council clause (Joint App. 740-41), and that the Local tried unsuccessfully to call Freeman as a witness to testify as to "why he is charging the Local Union and what he is charging the Local Union with and the reasons for it (Jt. App. 743) . . . to establish just what their proceedings have been through the years and especially

to establish the fact that they have allowed even work stoppages of a general nature without requiring the approval of the International President" (Jt. App. 751).

(4) *The Refusal Of The District Court To Make Findings That The Maryland Chapter Of NECA Was Guilty Of Bad Faith Bargaining And That The International Was Guilty Of Violations Of The Union Constitution Which Were Also Prohibited By The Unfair Labor Practice Provisions Of The NLRA.*

The District Court expressly refused to decide whether the Maryland Chapter of NECA was guilty of lack of good faith in the bargaining with the local, whether the IBEW conspired with and encouraged the Maryland Chapter not to bargain fairly, and whether the IBEW attempted to coerce members of the Local in the exercise of their collective bargaining rights protected by the NLRA (App. 65, n. 58), although these findings were relevant to the issue of whether International had violated the union constitution. Respondents claim that the question with respect to the propriety of the District Court's refusal to make a finding on these matters (No. 5 of the "Questions Presented" in the petition for certiorari) is not open in this Court because "petitioners did not suggest such a finding in their elaborate 'request for findings' made to the District Court. Furthermore, in the Court of Appeals, they defended, and praised as 'careful', the failure of the District Court to make this finding, arguing that, since all the evidence bearing on the IP's conduct and motivation was admitted, the failure so to characterize it was not 'crucial'" (citing petitioners' brief in the Fourth Circuit at pp. 76-77; see also, Local 24 Br. in Opp., pp. 12-13, to the same effect).

It is clear enough from the District Court's opinion that petitioners made perfectly clear to that court their desire

for the findings which the District Court expressly refused to make. As to the respondent's representation with regard to petitioners' argument in the Court of Appeals, the cited passage of petitioners' brief in the Fourth Circuit reads as follows:

> "Some of the evidence reveals what may conceivably be unfair labor practices, but these are relevant because the cases involve the good faith of the IP in the performance of his constitutional duties and a showing of the facts bearing on his state of mind is legitimate to establish the ultimate conclusion of violations of fiduciary duty. Such facts are merely evidentiary on the question of the International's motivation in revoking the charter and performance of its fiduciary obligations which are the crucial questions under the contract and under the law: [The footnote at this point reads] *It is submitted that this is the reason the court below erred in failing to make a finding with respect to the bad faith bargaining of the Maryland Chapter of NECA* [citation to evidence omitted]. The failure to make the finding was not crucial because the court found ample other evidence on the ultimate question of the IP's motivations and purposes. The court's refusal to make a finding on the Maryland Chapter's bad faith bargaining seems inconsistent with its willingness to make a finding as to the relationship of the employers to Local 24 ([Jt.] App. 30). Actually this finding is proper because the showing that Freeman, who should have been a good shepherd, was actually in league with the wolves, bears on his good faith in revoking the charter and the credibility of his protestations of good faith. [The footnote ends at this point.] *In any event, the District Court went farther out of its way than was really necessary to avoid conflict with the NLRB and carefully refrained from basing its decision on any ground that could conceivably involve such conflict.*" (Emphasis supplied.)

In view of the conclusions of the Fourth Circuit, made without the benefit of specific findings of the District Court on these matters, the refusal of the District Court to make such findings is now indeed "crucial" and fully open here.

Respondents seek to suggest that the District Court indicated that if it were to make such findings they would have been adverse to petitioners (IBEW Br. in Opp. 18-19; Local 24 Br., p. 12). Respondents rely for this argument upon a colloquy in which the District Judge stated that he had found no conspiracy up to that point. This was before the evidence of the draft decision by the Council came into the case, and was based in part on the IP's denial that there had ever been any such decision, which denial the District Judge specifically found in his final opinion to have been false (Jt. App. 23).

(5) *Counsel Fees*

While the District Judge was critical of the attorney who represented the Local in the events leading to the strike, he found that that attorney's advice as to the construction of the Union Constitution though wrong in the event, had presented at least a "bona fide" "jury question" (Jt. App. 354, 372). Moreover, after the IP rejected the Local's proposal on July 12, before the commencement of the disciplinary hearing, to terminate the strike and submit to independent arbitration, and insisted upon submission of the Local's case to the Council, which was the instrument of his breach of his fiduciary duty, only the IP's misconduct was operative and the Local either had to file suit or submit to the IP's illegal purpose. For the litigation made necessary at that point solely by the IP's wrong, the Local engaged trial counsel (of record in this court), who had had no previous connection whatever with any of the parties or with the subject matter of the case. If, as is sub-

mitted, the petitioners are entitled to relief, and this litigation was made necessary by the oppressive conduct of the IP, they are also entitled on this account to counsel fees.

(6) *Unclean Hands*

The IBEW states flatly as a fact that the District Court found the hands of the leaders of Local 28 to be unclean (IBEW Br. in Opp. 6, n. 5, 8, n. 9). The District Court made no such finding, but said merely that the conduct of the leaders in representing to the members before the strike vote that they had the green light for a strike "*might be* sufficient to bar relief if we were dealing only with the rights of the officers and leaders of the Local" (Jt. App. 43). However, any misconduct of the officers during the prelude to the strike is washed out of the case by the Local's offer to terminate the strike on July 12 and submit to independent arbitration, and the IP's rejection of the offer and bringing of disciplinary action for the admitted essential purpose of forcing the Local to the Council, where in fact the Local had already been sold out as to wages and would be forcibly supplanted as the collective bargaining agent of its members for the indefinite future. It offends fundamental justice to permit the International, whose sin has been worse than that of the local's leaders, to cast the ultimate stone of expulsion either on the local, or its leaders.

The numerous other allegations of violation of the union constitution by petitioners, said to amount to unclean hands, are irrelevant. These alleged additional violations by the Local (e.g., abrogating the Local's contract with the Maryland Chapter without consent of the IP) were not the subject of any charges, were not the basis upon which the IP acted, and "cannot be used to justify the

decision of the IP" (Jt. App. 37-8, n. 43). Moreover, the authorities are unanimous that breach of the IP's abiding fiduciary duty, and illegal purposes and violations of the IBEW Constitution by him, completely forfeit any right of the International to discipline the Local or its leaders, apart from the fairness of the hearing, even if it be conceded that the Local was guilty of a violation of the literal language of the Constitution. See the authorities cited at App. 30-31. In any event, the doctrine of unclean hands does not apply where it would defeat a constitutional or statutory or other strong public policy. 30 C.J.S., Equity 490-91, 19 Am. Jur., Equity, sec. 469. Cf. Restatement of Trusts (2d Ed., 1959) sec. 253 (wrongful dealing with trust property by beneficiary does not relieve trustee of fiduciary obligation).

Conclusion

For the reasons set forth in the petition and in this reply, certiorari should be granted. The important questions raised with regard to the fundamental rights of the rank and file of American labor under the recent Landrum-Griffin Act, which occupied the Congressional spotlight for such a substantial period of time, should be authoritatively settled.

Respectfully submitted,

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